Silence Begets Religion: *Bown v. Gwinnett County School District* and the Unconstitutionality of Moments of Silence in Public Schools

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I. INTRODUCTION

The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.[1]

Religion has been a divisive factor in the history of human civilization. Belief in the supernatural has not only defined and characterized cultures and societies, but has also been the catalyst for war. While many states profess to have a national religion, the United States is unique in providing constitutional protection to its citizens in the exercise of their beliefs.[2] Although the system of ethics and mores in the United States can arguably be analogized to the Judeo-Christian belief system, the government may not introduce any law that favors one religion over another or religion over nonreligion. Because of this broad prohibition, students and teachers alike may not audibly recite religious prayers in public schools.[3] Respect must be demonstrated to persons of all beliefs or nonbelief. This respect, however, is currently threatened by various state legislatures seeking to reintroduce school prayer into the public schools through statutes authorizing moments of silence. This Case Comment examines the constitutionality of such statutes, concluding that indeed "moments of silence" violate the Establishment Clause of the First Amendment. Part II focuses on the history of the Establishment Clause and the development of the proper test for determining violations. Part III centers upon the specific case of *Bown v. Gwinnett County School District*[4] and Georgia's Moment of Quiet Reflection in Schools Act which mandates a period of silence in the public schools. And finally, Part IV evaluates moment of silence laws under the three-prong *Lemon* test, concluding that these statutes are inherently unconstitutional.

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[1] James Madison, Memorial and Remonstrance Against Religious Assessments ¶ 1 (1785) [hereinafter Memorial and Remonstrance] *in* SAUL K. PADOVER, THE COMPLETE MADISON 299–300 (1953).

[2] The relevant portion of the First Amendment states the following: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

[3] *See* Engel v. Vitale, 370 U.S. 421, 424–25 (1962).

[4] 895 F. Supp. 1564 (N.D. Ga. 1995).

II. THE COURTS AND THE ESTABLISHMENT CLAUSE

> [E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution.[5]

The cogent alliance between Christianity and the United States government is interwoven together as thread in the larger tapestry of American society. Whether it be in the words of the Pledge of Allegiance,[6] the inscriptions on American currency,[7] or the National Day of Prayer,[8] the Judeo-Christian God continues to find its place within American culture.

Any analysis of the Establishment Clause must begin with an inquiry into the three main schools of thought that influenced the drafters of the First Amendment: (1) the Evangelical View, (2) the Jeffersonian View, and (3) the Madisonian View.[9] The Evangelical influence viewed the separation of church and state as a means of protecting the church. The church feared the influence of "worldly corruptions" and saw the absence of the state in church affairs as imposing a climate on society that was conducive to the conduct of all religions.[10] Thus, the Evangelical View was one of positive toleration.

The Jeffersonian school of thought, on the other hand, was just the opposite of that of the evangelics. Jefferson viewed the separation of church and state as a means of safeguarding the secular interests of society against

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[5] Madison, Memorial and Remonstrance, *supra* note 1, ¶ 7.

[6] *See* 36 U.S.C. § 172 (1994) (In a 1954 amendment to the Pledge of Allegiance, the words "under God" were added to read "one nation under God.").

[7] The government requires that each coin minted contain the inscription "In God We Trust." 31 U.S.C. § 5112 (d)(1)(1994). *See* O'Hair v. Blumenthal, 462 F. Supp. 19, 19–20 (W.D. Tex. 1978), *aff'd sub nom.*, O'Hair v. Murray, 588 F.2d 1144 (5th Cir. 1979) (holding that the national motto and its inscription on coins do not violate the Establishment Clause or Free Exercise Clause of the First Amendment because its use is of a patriotic character); *see also* Aronow v. United States, 432 F.2d 242, 243–44 (9th Cir. 1970) (holding that the national motto has no theological or ritualistic impact).

[8] *See* 36 U.S.C. § 169h (1994) (establishing the first Thursday of May in each year as a "National Day of Prayer, on which the people of the United States may turn to God in Prayer and Meditation at churches, in groups, and as individuals").

[9] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3, at 1158–59 (2d ed. 1988).

[10] *See id.*

"ecclesiastical deprecations and incursions."[11] Religion must be divorced from the state because only then could free choice among political views occur.[12]

And finally, the Madisonian view was a compromise of the two aforementioned ideals. Madison believed that both religious and secular interests were able to thrive best when each was permitted to act freely within its own sphere.[13] These interests would be best protected "by an entire abstinance [sic] of the Government from interference in any way whatever, beyond the necessity of preserving public order, [and] protecting each sect against trespass on its legal rights by others."[14] Determination of the actual intent of the Framers remains as an ongoing debate within the High Court to this date. The various Justices continue to point to the Framers' intent as a key in determining violations of the Establishment Clause. Unfortunately, the Justices cannot agree.

The first modern case to reach the Court concerning the Establishment Clause of the First Amendment[15] involved a local New Jersey school district authorization that reimbursed parents of parochial school children the cost of transporting their child to school via the public bus transportation system.[16] In ultimately deciding that there was no violation of the Establishment Clause, the Court laid the foundation for later Establishment Clause interpretation.

The *Everson* Court reasoned that the Establishment Clause was the result of three elements, namely the background of the period in which the religion clauses were scribed, the conglomeration of the Madisonian and Jeffersonian views, and the conjecture that in the absence of a church-state separation, persecution and civil strife would reign.[17] The Court noted that many early settlers emigrated from Europe to escape the religious persecution and tax burdens of state churches in their respective homelands.[18] The early colonies, however, began mimicking the actions of the old world by installing state churches, by forcing all persons who lived in the community to pay taxes to the church, and by persecuting those who practiced different beliefs.[19] The

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[11] *Id.* at 1159.

[12] *See id.*

[13] *See id.*

[14] *Id.* (alteration in original) (quoting JAMES MADISON, IX, THE WRITINGS OF JAMES MADISON (C. Hunt ed., 1910)).

[15] The First Amendment was first incorporated to the states through the Fourteenth Amendment in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[16] *See* Everson v. Board of Educ., 330 U.S. 1, 3–4 (1947).

[17] *See* TRIBE, *supra* note 9, § 14-3 at 1160.

[18] *See Everson*, 330 U.S. at 8–9.

[19] *See id.* "The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials

resentment which arose amongst the colonists from this religious oppression found "expression" in the First Amendment.[20] In his *Memorial and Remonstrance Against Religious Assessments*, Madison argued that true religion did not need the support of human law, the interest of society was best served when the minds of humans were wholly free, and government-established religions inevitably resulted in persecution.[21] Thus the early Americans desired a government deprived of all power to tax, support, assist, or interfere with any religion (or lack of religion) or belief held by individuals or groups.[22]

From this examination of history, the *Everson* Court formulated a broad prohibition through the Establishment Clause of government interference with religion:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was indeed to erect "a wall of separation between Church and State."[23]

This prohibition is the basis of the standard used for determining violations of the religion clauses. Despite this comprehensive language, the Court upheld

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authorized these individuals and companies to erect religious establishments . . . ." *Id.* at 9. In Massachusetts in the winter of 1774, the state church had imprisoned fourteen Baptists because of their refusal to pay taxes to the Congregationalist minister. In Virginia, in 1771, four Baptist ministers were imprisoned for holding a religious service "under the pretense of the exercise of Religion in other manner than according to the Liturgy and Practice of the Church of England." Additionally, by 1790, most states authorized the taxation of all for the support of religion, although individuals could give to the church of their own choice. *See* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 2, 3, 10 (1994).

[20] *See Everson*, 330 U.S. at 11.

[21] *See id.* at 12 (citing JAMES MADISON, II WRITINGS OF JAMES MADISON 183 (Galliard Hunt ed., 1910)).

[22] See *Everson*, 330 U.S. at 11.

[23] *Id.* at 15–16.

the validity of the New Jersey statute.[24]

The Court concentrated on two factors in attempting to reconcile the prohibition with its holding. First, the Court likened the reimbursement of parents for their child's transportation cost to public governmental services offered by the state for the benefit of all citizens and organizations, including religious institutions.[25] Parents might be reluctant to send their child to parochial school[26] if the government did not provide services such as police and fire protection, sewage disposal, sidewalks, and public highways. In the same way, parents might be reluctant to send their child to a religious school if required to pay the child's bus fare out of pocket, when the state incurs the cost of transportation for public school children.[27] Inevitably, if the government discontinued these services, the schools would have a difficult time operating. The First Amendment was not intended to create obstacles for religious institutions.[28]

Second, the Court determined that the New Jersey statute was constitutional because, quite simply, the reimbursement policy was applicable regardless of religious affiliation.[29] The Court had previously stated that parents may send their children to religious schools, as long as those schools complied with state compulsory education laws.[30] The New Jersey statute did nothing more than ensure a safe, reliable means of transportation for all students, regardless of religion.

Hence, the importance of *Everson* is not so much its ultimate validation of the New Jersey statute, but rather its broad prohibition of the commingling of church and state and its examination of history in determining the breadth and purpose of the Establishment Clause.[31]

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[24] *See id.* at 17.

[25] *See id.* at 17–18.

[26] This Case Comment uses the terms "parochial school" and "nonpublic school" interchangeably. The essence of the idea is that these are privately operated institutions. It just so happens that most nonpublic schools are privately run by religious organizations.

[27] *See Everson*, 330 U.S. at 1.

[28] "That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Id.* at 18.

[29] *See id.*

[30] *See id.* (citing Pierce v. Society of Sisters, 268 U.S. 510 (1924)).

[31] *Everson*, however, did not avoid the criticisms of the dissent and later scholars. Justice Jackson, dissenting, stated that the "undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters." *Id.* at 19 (Jackson, J., dissenting). Additionally, he reasoned that the majority's basic fallacy was its

The first Supreme Court opinion to invalidate a statute as a violation of the Establishment Clause involved a noneconomic benefit to religion: time release programs.[32] Under a Champaign County, Illinois school district policy, religious clergy employed by private religious organizations taught religious studies to interested students once a week in the public schools. The school board authorized the teachers to release students from their secular studies in order to attend these religious meetings. Those students desiring not to take part in the religious affair were sent to other parts of the school in order to pursue secular activities.[33] The parent of a child in the Champaign public schools challenged the policy on the ground that it violated the Establishment Clause. The state supreme court affirmed the constitutionality of the time release program. The United States Supreme Court reversed.

In concluding that the time release program did indeed violate the Establishment Clause, the majority heavily relied upon the broad prohibition established by the *Everson* Court.[34] The Court reasoned that allowing pupils to disregard their secular studies during school hours in order to pursue religious teachings by private clergy constituted state assistance in aiding religious groups to spread their beliefs.[35] The Constitution required complete separation from religion, not neutral governmental assistance to all religions.[36] The requirement of the First and Fourteenth Amendments—that states not use the public schools in fostering religion among students—did not suggest a

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total disregard of the "essentially religious test by which beneficiaries of this expenditure are selected." *Id.* at 25 (Jackson, J., dissenting). Like Justice Jackson, Justice Rutledge, in his dissenting opinion, opposed any degree of relation between the civil state and religion. The purpose of the Establishment Clause was "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." *Id.* at 31–32 (Rutledge, J., dissenting). *See also* Robert A. Holland, Comment, *A Theory of Establishment Clause Adjudication: Individualism, Social Contract, and the Significance of Coercion in Identifying Threats to Religious Liberty*, 80 CAL. L. REV. 1595, 1602–04 (1992).

[32] *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).

[33] *See id.* at 205, 209.

[34] *See id.* at 210–11 (citing Everson v. Board of Educ., 330 U.S. 1, 15–16 (1947)).

[35] "This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment . . . ." *Id.* at 210.

[36] *See id.* at 210 n.6 (citing *Everson*, 330 U.S. at 59, 60 (Rutledge, J., dissenting)). "Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small." *Id.* at 210 n.7 (citing *Everson*, 330 U.S. at 52–53).

governmental opposition to religion.[37] On the contrary, the history of the Establishment Clause intimates that "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[38] It is vital that a wall between the church and state "be kept high and impregnable."[39]

Because of the history of the First Amendment, the precedent set by the *Everson* Court, and the fact that public facilities were used during school hours for nonsecular means, the Justices concluded that the state was impermissibly aiding religion. The Court, therefore, in an eight to one decision,[40] invalidated the time release program as a violation of the Establishment Clause.[41]

In 1962, the Supreme Court declared the unconstitutionality of state sponsored school prayer.[42] At issue in *Engel* was the validity of a New York statute mandating the daily recitation of a short religious prayer at the commencement of class in the public schools.[43] The parents of ten children in New York public schools alleged that a violation of the Establishment Clause occurred because the state legislature of New York had composed the prayer.[44]

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[37] *See id.* at 211.

[38] *Id.* at 212.

[39] *Id.*

[40] Justice Reed was the lone dissenting judge. In his argument, Reed looked to the presence and tradition of religion in the American society and concluded that the American people accepted this as part of its culture and tradition and nothing more. *See id.* at 239 (Reed, J., dissenting).

[41] *But see* Zorach v. Clauson, 343 U.S. 306 (1952) (affirming the constitutionality of a time release program because students left school grounds to attend the religious activities); *see also* Holland, *supra* note 31, at 1618–19.

[42] *See* Engel v. Vitale, 370 U.S. 421, 424–25 (1962). Prior to *Engel*, in 1961, the Court upheld the validity of a Maryland statute advocating the closure of labor, business and commercial activity on Sundays. *See* McGowan v. Maryland, 366 U.S. 420 (1961). The Court analogized "Sunday closing laws" to societal ethics and morals such as the illegality of murder. Although Sunday closing laws, like murder, may provide some benefit to the church—Sunday closing laws allow church attendance, while the illegality of murder is consistent with the Ten Commandments—the Establishment Clause did "not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." *Id.* at 442. The Court cited secular reasons—health and safety of workers, uniform day of rest, repose, recreation and tranquillity for all citizens, and a day to strengthen family ties—for the existence of the Sunday closing laws. *See id.* at 434–35, 445, 450, 451.

[43] The words of the prayer were as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

[44] *See id.* at 425.

The New York Court of Appeals upheld the constitutionality of the statute. The United States Supreme Court reversed.

Writing for the majority, Justice Black flatly declared that the government should in no way involve itself in the business of creating prayers.[45] In concluding that the purpose of the recitation of the prayer was purely religious, Black concentrated on the lessons taught by history concerning the treading of a national government upon religious affairs. Invariably, government intrusions into religion have brought about conflict, persecution, mistrust of government, and loss of respect for religion.[46] As one regime placed its stamp of approval upon one belief system, minorities clamored for change and attempted to influence state leaders to change with the next regime.[47] As a result of this constant conflict, a mistrust of government arose as each regime persecuted the religious minority in an effort to remain in power.[48] Additionally, others lost respect for any religion once held in favor with the state. [49] Hence

> the First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government . . . .[50]

The Court found that through the daily recitation of the prayer, the New York legislature used the prestige of the government to "influence the kinds of prayer the American people [could] say."[51] The prayer established the religious beliefs embodied within.[52] The legislature had created an "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion."[53] For these reasons, the prayer violated the Establishment Clause of the First Amendment.

The principle of governmental neutrality in the realm of religion was the driving force behind the decision of the Court to invalidate Pennsylvania and Maryland statutes requiring a daily reading of the Bible over the public address

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[45] *See id.* at 433.
[46] *See id.* at 425–26, 431.
[47] *See id.* at 426–27.
[48] *See id.* at 432.
[49] *See id.* at 431.
[50] *Id.* at 429–30.
[51] *Id.* at 429.
[52] *See id.* at 430.
[53] *Id.* at 431.

system.[54] The school districts argued that the reading was not of a religious intent but rather possessed the secular purposes of promoting moral values, contradicting the materialistic trend of American society, perpetuating educational institutions, and teaching literature.[55] Those students not wishing to take part in the reading were excused with parental permission. In affirming the decision of the district court, the United States Supreme Court discounted these secular intents and held the statutes violative of the Establishment Clause.

The Court considered both the purpose and the effect of the statute, for a primary effect of a statute must not be one that advances or inhibits religion.[56] By reviewing previous cases challenging the Establishment Clause, the Court noted the overall theme of governmental neutrality, the necessity of which evolved through history. The state pierced this wall of neutrality by allowing essentially religious services to occur each morning with the recitation of passages from the Bible, followed by the Lord's Prayer.[57] The religious end result overshadowed the purported secular purposes for the readings. The Bible is part of religion. While the study of the Bible in public schools is permissible for its literary or historical value,[58] its use at the beginning of the school day lacks any such value.[59] Indeed, no discussion occurred following the reading.

Additionally, the allowance of student exclusion from the readings was of little support to the state. This exclusion, in fact, indicated a recognition by the state of the religious nature of the Bible verses.[60] Moreover, historically, the majority has never been allowed to require religious exercises which violate minority beliefs by simply creating state laws excusing the minorities from the majority practice.[61] This action is inconsistent with the purpose and breadth of the Bill of Rights.

Hence, the *Schempp* Court disallowed a breach of the wall of neutrality

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[54] *See* School Dist. v. Schempp, 374 U.S. 203, 226–27 (1963).

[55] *See id.* at 223–24.

[56] *See id.* at 222. This two-part analysis later served as the basis for the first two prongs of the *Lemon* test. *See infra* note 64 and text accompanying note 65.

[57] *See id.* at 223.

[58] *See id.* at 225.

[59] *See id.* at 224.

[60] *See id.*

[61] The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id. at 226 (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

separating the church and the state. By analyzing the purpose and effect of the statutes, the majority found that the wall must stand firm, no matter the size of encroachment.[62]

The cumulative effect of the preceding cases formed the basis for the three-prong Establishment Clause test expounded by the Court in *Lemon v. Kurtzman*.[63] The *Lemon* test is three-fold: (1) the challenged statute must have a secular, legislative purpose; (2) the primary effect of the statute must neither advance nor inhibit religion; and (3) the statute must not cultivate an excessive government entanglement with religion.[64] At issue in *Lemon* were two state

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[62] *See Schempp*, 374 U.S. at 225 ("[I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent . . . .").

[63] 403 U.S. 602, 612–13 (1971). Prior to *Lemon*, two Establishment Clause cases which reached the Court deserve at least a moment's regard. In *Board of Education v. Allen*, 392 U.S. 236 (1968), the Court upheld a New York statute permitting public school districts to purchase textbooks with public funds and lend them to all students (including parochial school students) in the public school district. *See id.* at 239. By analogizing the book-loaning statute in *Allen* to the transportation statute at issue in *Everson*, the Court was able to reiterate its broad prohibition of intermingling of church and state, yet deem the statute constitutional because the primary effect of the statute was not the advancement of religion. *See id.* at 243. The important aspect of this case is the adoption by the Court of the stated Establishment Clause test set forth in *Shempp*: "'[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.'" *Id.* (quoting School Dist. v. Schempp, 374 U.S. 203, 222 (1963)).

In the second case, the Court affirmed the constitutionality of a tax exemption for religious organizations on property used exclusively for religious exercises. *See* Walz v. Tax Comm'n, 397 U.S. 664, 666–67 & n.1 (1970). The importance of *Walz* is the evaluation of the statute beyond its intent and effect. The Court reasoned that there must not be excessive government entanglement with religion in the statute. *See id.* at 674. The test, the Court continued, was one of degree, determining "whether the [state] involvement [with religion] is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Id.* at 675. The Court determined that direct money subsidies to religious organizations contained more elements of entanglement than an indirect benefit, namely tax exemptions, due to the necessary enforcement of statutory and administrative standards. *See id.* Hence, the Court held tax exemptions as constitutional. This analysis of government entaglement formed the third part of the *Lemon* test. *See infra* text accompanying note 65.

[64] *See Lemon*, 403 U.S. at 612–13. The three-prong *Lemon* test has repeatedly been criticized by later courts and scholars. Some argue that the test "restricts religious participation in the political process without adequate justification." Hal Cubertson, *Religion in the Political Process: A Critique of* Lemon*'s Purpose Test*, 1990 U. ILL. L. REV. 915, 916 (1990). Others criticize the test as a threat to religious liberty. *See* Holland, *supra* note

statutes concerning state reimbursement to nonpublic schools. The first was a Rhode Island statute allowing state officials to supplement the salary of a teacher who instructs secular courses in a nonpublic school. The second was a Pennsylvania statute authorizing direct reimbursement by the state to the nonpublic schools for expenses associated with salaries, textbooks, and instructional materials for courses in secular subjects.[65] In both situations, the legislatures found that the authorization of these reimbursements best served the educational needs of each respective state. The Supreme Court held both of these statutes in violation of the Establishment Clause.

After quickly accepting the stated legislative purposes of each statute, thus satisfying the first prong of the *Lemon* test, the Court determined that these statutes fostered excessive government entanglement with religion. "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[66] The Court reasoned that the tight relationship between the parochial schools and the Catholic Church would require too much surveillance to assure that religious ideals were not furthered by the use of the state reimbursement money.[67] Relying on the district court findings in the Rhode Island case, the Court noted that the church schools involved in the program were physically close to the parish churches, the buildings contained religious symbols, the majority of teachers were nuns, the atmosphere of the school was quite religious, and the potential for teachers to instruct their religious ideals, even through secular subjects, was great.[68] Although course instructors may not purposely inject religious ideals into their secular subjects, the potential to do so was great because the financial control of the schools was largely at the discretion of each individual parish, nuns were principals in all but two of the schools, and a Handbook of School Regulations, "which had the force of synodal law in the diocese," governed all the schools.[69] The Court reasoned that the parochial schools might actually be able to separate the religious and secular teachings, but this separation would

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31, at 1653–58.

[65] *See Lemon*, 403 U.S. at 607, 609.

[66] *Id.* at 615.

[67] *See id.* at 619–21.

[68] *See id.* at 615, 617.

[69] *Id.* at 617–18.

require excessive surveillance.[70] This surveillance was an impermissible governmental entanglement.[71]

Additionally, the Court considered the potential political divisiveness of the statutes. As costs of parochial education would rise, proponents of the reimbursement policy would advocate their cause and encourage political action. In the same respect, opponents of the policy would likely counter this argument by championing political action against the statutes. "It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith."[72] The First Amendment was enacted, in part, to end political division along religious lines, for this threatens the very political process.[73] This conflict would cause individuals to concentrate on religious ideals in political arenas, and disregard other necessary issues at every political level, thereby causing excessive entanglement between the state and religion.[74]

Because of the excessive government entanglement between the state and religion resulting from the need for surveillance of the parochial schools to ensure no intrusion of religious ideals into secular subjects, and because of the potential political divisiveness of the statutes causing individuals to align themselves along religious lines, the Pennsylvania and Rhode Island reimbursement policies were held unconstitutional.[75]

In the first and only case to reach the Supreme Court concerning "moments of silence" in public schools, the Court held in a six to three decision that the Alabama statute authorizing a moment of silence for meditation or voluntary prayer endorsed religion, lacked a secular purpose, and therefore violated the Establishment Clause.[76] The plaintiff alleged that the statute authorized the

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[70] *See id.* at 619–21 ("A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. . . . These prophylactic contacts will involve excessive and enduring entanglement between state and church.").

[71] *See id.* at 620.

[72] *Id.* at 622.

[73] *See id.*

[74] *See id.* at 623.

[75] The Court, until recently, used the *Lemon* test in every Establishment Clause challenge, save one. That one was *Marsh v. Chambers*, 463 U.S. 783 (1983), in which the Court relied upon the "deeply embedded" history and tradition in the United States of legislature prayer to uphold the validity of a Nebraska statute authorizing prayer at the opening of the state legislature by a chaplain paid with public funds. *See id.* at 795.

[76] *See* Wallace v. Jaffree, 472 U.S. 38, 56–59 (1985). Several lower courts have considered moments of silence in the public schools. *See* May v. Cooperman, 780 F.2d 240 (3d Cir. 1985); Walter v. West Virginia Bd. of Educ., 610 F. Supp. (S.D. W. Va. 1985);

maintenance of religious exercises in the public schools, and this was contrary to the First Amendment to the Constitution. The plaintiff further asserted that his two minor children had been "indoctrinated from the beginning of the school year" by the teacher who led the class in a daily prayer. Teachers and students alike ostracized the children for not participating in the daily ritual.[77] The district court decided that the statute was constitutional, because the Establishment Clause did not prohibit the state from establishing a religion.[78]

Duffy v. Las Cruces Pub. Sch., 557 F. Supp. 1013 (D.N.M. 1983); Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982); Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976); *see also* 440 N.E.2d 1159 (Mass. 1982) (advisory opinion of Supreme Court of Massachusetts to the Massachusets House of Representatives); 307 A.2d 558 (N.H. 1973) (advisory opinion of the Justices of the Supreme Court of New Hampshire to the New Hampshire Senate); *cf.* Marsa v. Wernik, 430 A.2d 888 (N.J. 1981) (challenging a moment of silence at the commencement of city council meetings).

Prior to *Jaffree*, but subsequent to *Lemon*, the Court considered the Establishment Clause numerous times. *See* Widmar v. Vincent, 454 U.S. 263 (1981) (requiring public universities to hold facilities available for religious and nonreligious student groups alike); Stone v. Graham, 449 U.S. 39 (1980) (holding statute authorizing posting of Ten Commandments in public classrooms violated the Establishment Clause); Wolman v. Walter, 433 U.S. 229 (1976) (validating statutes allowing public schools to loan books to religious schools, state funded standardized testing of nonpublic school students, speech and hearing diagnostic testing of nonpublic students by public employees, therapeutic services to nonpublic students off of nonpublic school grounds; but invalidating statutes authorizing state aid of teaching materials, such as maps, etc., to religious schools and state funding for transportation for nonpublic school field trips); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (holding New York statute authorizing funding for maintenance and repair of nonpublic schools as violative of the Establishment Clause).

One case of importance during this period held that the erection of a creche in a state sponsored holiday display, although a symbol of religion, was not violative of the First Amendment. *See* Lynch v. Donnelly, 465 U.S. 668, 687 (1984). The importance of this case is not so much in its holding, but rather in the introduction of the "endorsement test" as the means of determining whether the challenged statute has a secular purpose:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Id. at 690 (O'Connor, J., concurring). The majority of the Court embraced this view in *Jaffree*, 472 U.S. at 56, and this view has subsequently become part of the analysis under the purpose prong of the *Lemon* test.

[77] *See Jaffree*, 472 U.S. at 42.

[78] *See id.* at 45.

The court of appeals overruled the district court opinion, and the United States Supreme Court affirmed.

After visiting the same history hashed out by earlier courts, the Court applied the *Lemon* test to the Alabama statute, holding that an impermissible religious purpose existed.[79] The Court first noted that the sponsor of the legislation had inserted into the record without objection that this bill was an effort to return prayer to the public schools.[80] In the district court, the sponsor further stated that this reintroduction of prayer was his intent when he sponsored this legislation.[81] Moreover, the state did not demonstrate any evidence indicating a secular purpose for the statute.

Second, the Court reasoned that this religious purpose was substantiated by examining the statute authorizing the period of meditation or voluntary prayer with a previous statute mandating a period of silence for meditation only.[82] The only difference between the two statutes was the addition of the words "or voluntary prayer." The Court thus reasoned that the only explanation for the addition of the new statute was to place prayer back into the schools. This reason was impermissible under the Establishment Clause for it indicated a desire to "characterize prayer as a favored practice."[83]

Because of the impermissible religious intent of the Alabama legislature, as exhibited through the intent of the sponsor of the bill and the addition of the words "or voluntary prayer," the Supreme Court deemed the Alabama moment of silence statute unconstitutional.[84]

The last major case to reach the Supreme Court involving a direct challenge to the Establishment Clause of the First Amendment concerned the offering of a nonsectarian prayer in the invocation and benediction of a high school graduation.[85] The school district argued that attendance at graduation

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[79] *See id.* at 66.

[80] *See id.* at 56–57.

[81] *See id.*

[82] *See id.* at 58–59.

[83] *Id.* at 60.

[84] There is some indication by the Court, both in its concurring and dissenting opinions, that moments of silence statutes making no mention of religion may be constitutional. *See infra* note 130 and accompanying text.

[85] *See* Lee v. Weisman, 505 U.S. 577 (1992). Following *Jaffree* and prior to *Weisman*, the Court considered several Establishment Clause challenges. *See* Board of Educ. v. Mergens, 496 U.S. 226 (1990) (holding secondary schools must provide equal access to facilities to religious and nonreligious student groups); County of Allegheny v. ACLU, 492 U.S. 573 (1989) (holding that display of a creche inside courthouse endorses a state religion, but display of menorah outside of courthouse next to Christmas tree had no effect of endorsing a state religion); Edwards v. Aguillard, 482 U.S. 578 (1987)

ceremonies was not required and that the importance and formal atmosphere of the event merited a prayer.[86] A high school student and parent, on the other hand, argued that the graduation prayer forced them to conform to a religion established by the state. The district court and appellate court both found the statute violative of the First Amendment.[87] The Supreme Court affirmed these opinions.

The Court concentrated on two aspects in determining a violation: (1) the principal of the school acted as an agent of the state, and (2) the effect of the prayer on dissenters of prayer at the graduation was to indirectly coerce them into a religious conformance established by the state.[88] Concerning the first aspect, the state was impermissibly involved with religion when the principal decided to include an invocation and benediction in the graduation ceremonies, chose the clergyman to give the address, and distributed to the clergy guidelines in developing a nonsectarian prayer.[89] The action at fault was not the good faith of the school district in offering the prayer, but the fact that the public school took on the obligation at all.[90] Religion belonged in the private sphere, not in the public domain.[91]

Second, the effect of the state sponsored prayer in secondary school commencement exercises was to subtly coerce those not wishing to take part to conform to the religious ideals expressed in the prayer. The decisions of the principal resulted in an indirect coercive effect on the students, providing no alternative to a clearly religious action.[92] "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."[93] Students are compelled to stand during the recitation of the prayer and may be injured by a perception of being "forced by the State to pray in a manner [their] conscience will not allow."[94] Because students do not have the real option of not attending their graduation ceremony, although technically, attendance is not mandatory, "the Constitution forbids the State to

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(invalidating Louisiana statute prohibiting the instruction of the theory of evolution unless accompanied by instruction in the Creation Theory).

[86] *See Weisman*, 505 U.S. at 594–95.

[87] *See id.* at 584, 585.

[88] *See id.* at 587, 596.

[89] *See id.* at 587–88.

[90] *See id* at 588–89.

[91] *See id.* at 588.

[92] *See id.*

[93] *Id.* at 592.

[94] *Id.* at 593.

exact religious conformity for a student as the price of attending her own high school graduation."[95]

Hence, because of the state involvement, through the principal, in the selection of clergy and preparation of the prayer at graduation ceremonies, and because of the indirect coercive effect on students to conform to pray in a manner which may be contrary to their consciences, the Supreme Court struck this statute down.

The foregoing analysis of the prior decisions of the Supreme Court concerning challenges to the Establishment Clause is crucial to the understanding of the means of determining the constitutionality of moments of silence in public schools, the issue proffered in *Bown v. Gwinnett County School District.*[96] Although the Court has continued to cite Thomas Jefferson, arguing the necessity of a wall between the state and the church, the Supreme Court has dissembled some of the bricks from its very foundation and tossed them on the ground around the wall, leaving questions of wonder for theologians and lay persons alike.

The opinions, while allowing many questions to linger as to the correct determination of Establishment Clause violations, are nevertheless the framework that lower courts have to erect their own walls. In Part IV, this Case Comment argues that the reasoning of the Court to date suggests the unconstitutionality of "moments of silence" in public schools. Through adherence to precedent and the intent of the Framers, moments of silence in schools cannot constitutionally exist within our free society.

III. *BOWN V. GWINNETT COUNTY SCHOOL DISTRICT*

> Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered.[97]

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[95] *Id.* at 596.

[96] 895 F. Supp. 1564 (N.D. Ga. 1995).

[97] Madison, Memorial and Remonstrance, *supra* note 1, ¶ 4.

A. *The Facts—A Champion of Rights or a Disobedient Citizen?*

The Moment of Quiet Reflection in Schools Act,[98] in its entirety, states the following:

> (a) In each public school classroom, the teacher in charge shall, at the opening of school upon every school day, conduct a brief period of quiet reflection for not more than sixty seconds with the participation of all the pupils therein assembled.
> (b) The moment of quiet reflection authorized by subsection (a) of this Code section is not intended to be and shall not be conducted as a religious service or exercise but shall be considered as an opportunity for a moment of silent reflection on the anticipated activities of the day.
> (c) The provisions of subsections (a) and (b) of this Code section shall not prevent student initiated voluntary school prayers at schools or school related events which are nonsectarian and nonproselytizing in nature.

On August 22, 1994, Brian Gillespie Bown, a teacher at South Gwinnett High School defied this Act and continued to teach throughout the moment of silence.[99]

During the prior summer, Bown had written to the superintendent of Gwinnett County Schools stating his objections to the mandated period of silence in the public schools. He was concerned about his liability in implementing the silence, which, in his opinion, would be banning speech.[100]

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[98] GA. CODE ANN. § 20-2-1050 (Supp. 1995). This provision repealed the prior 1969 statute, which provided for voluntary school prayer:

> (a). In each public school classroom, the teacher in charge may or, if so authorized or directed by the board of education by which he is employed, shall, at the opening of school upon every school day, conduct a brief period of silent prayer or meditation with the participation of all the pupils therein assembled.
> (b). The silent prayer or meditation authorized by subsection (a) of this section is not intended to be, and shall not be conducted as, a religious service or exercise, but shall be considered as an opportunity for silent prayer or meditation on a religious theme by those who are so disposed, or a moment of silent reflection on the anticipated activities of the day.

Silent Prayer or Meditation in Public School Classrooms, Act No. 324, 1969 Ga. Laws 488 (1969) (repealed 1994) (cited in *Bown*, 895 F. Supp. at 1566).

[99] *See Bown*, 895 F. Supp. at 1565.

[100] *See id.* at 1568–69 ("If I determine that my conscience will permit me to enforce this law, what guidance can you give me on exceptions to the absolute ban on speech during

In a later deposition, Bown testified that he was a "born again" Christian whose religious beliefs coincided with the Unitarian Church. He believed that the Act favored Christians, and thus violated his religious belief that all religions deserve respect.[101]

In response to Bown's letter, the school administration sent to Bown an administrative bulletin prepared by the school system to answer questions concerning the moment of quiet reflection.[102] Moreover, prior to the commencement of classes for the school year, Bown met with the principal of the school and stated his reluctance to implement the statute.[103] The school board, as a result of Bown's concerns, resolved that the principal of each school would daily read a prepared announcement over the public address system introducing the moment of reflection.[104]

Hence, on the morning of the first day of classes, Ms. Hendrix, the principal of South Gwinnett High School, read the following announcement, thereby implementing the moment of reflection: "As we begin our day, let us take a few moments to reflect quietly on our day, our activities and what we hope to accomplish."[105] After a momentary pause, Bown continued his lesson and stated, "You may do as you wish. That's your option. But I am going to continue with my lesson."[106]

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the 'moment of quiet reflection?'").

[101] *See id.* at 1569, n.4.

[102] In part, the bulletin stated the following:

> It is important that we recommend that teachers and administrators do not suggest or imply that students should or should not use that time for prayer. If a student asks, a teacher should advise a student that if the student desires to have a quiet prayer, he or she may do so. The statute specifically says "moment of quiet reflection." This clearly precludes students using the moment of quiet reflection to pray audibly, singly or in unison. We should not allow or tolerate any coercion or overbearing by some students to force others to pray. Nevertheless, we should be tolerant of non-disruptive, nonsectarian, non-proselytizing, student initiated prayer so long as it does not occur during the moment of quiet reflection; otherwise, it will not be a moment of quiet reflection. This time is not intended to be and shall not be conducted as a religious service or exercise, but considered as an opportunity for a moment of silent reflection on the anticipated activities of the day.

Id. at 1569.

[103] *See id.*

[104] *See id.* ("[T]his procedure was selected to insure that the moment of silence is handled the same way every day and to insure that the teachers are not required to make the announcement or remember to do it.").

[105] *Id.*

[106] *Id.*

Following his statement, a few students in Bown's class placed Bibles on their desks, while another bowed her head in prayer. Bown continued teaching class.

In the afternoon of this same, eventful day, Brian Bown met with the superintendent and the principal to discuss his early morning rebellious actions. After understanding that the school system would take disciplinary actions if Bown did not comply with the moment of reflection, Bown received permission to ponder his future actions until the following day. The next morning Bown refused to allow the moment of quiet reflection and was promptly suspended with pay.[107]

The following day, August 24, 1994, Bown filed a complaint in the United States District Court for the Northern District of Georgia.[108] In his complaint, Bown sought a declaratory judgment that the Moment of Quiet Reflection in Schools Act violated the Constitution and sought a permanent injunction against its implementation.[109]

On September 21 and 22, 1994, the school board of Gwinnett County conducted a termination hearing of Bown. Bown appeared with his attorney at the meeting, but presented no evidence. The Board unanimously voted to terminate Bown's employment with the school district.[110]

In the subsequent suit, the United States District Court for the Northern District of Georgia upheld the constitutionality of the Moment of Quiet Reflection in Schools Act.

B. *The Reasoning—Silence and Nothing More?*

The district court applied the three-prong *Lemon* test, and therefore this Case Comment will address the holding of the court in three separate sections.[111]

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[107] *See id.* at 1570.

[108] *See id.* at 1565.

[109] *See id.* at 1570.

[110] *See id.*

[111] As stated above, the United States Supreme Court has applied the *Lemon* test in the majority of cases since the test was developed in 1971. *See supra* note 76 and accompanying text. The Eleventh Circuit had ruled prior to *Bown* that the reasoning used in *Marsh* was not applicable in the "'special context of the public elementary and secondary school system,' [where] the Supreme court [sic] 'has been particularly vigilant in monitoring compliance with the Establishment Clause.'" *Bown*, 895 F. Supp. at 1573 (alteration in original) (quoting Jager v. Douglas County Sch. Dist., 862 F.2d 824, 828 (11th Cir. 1989)). The Supreme Court in *Marsh* had upheld prayer before the commencement of the Nebraska

1. *Secular Purpose*

Based on the plain meaning of the statute and the legislative history of the Moment of Quiet Reflection in Schools Act, the court found a secular purpose.

First, the court reasoned that the specific language of the statute distinctly demonstrated the secular intent of the statute. The preamble to the statute has no mention of prayer:

> The General Assembly finds that in today's hectic society, all too few citizens are able to experience even a moment of quiet reflection before plunging headlong into the day's activities. Our young citizens are particularly affected by this absence of an opportunity for a moment of quiet reflection. The General Assembly finds that our young, and society as a whole, would be well served if students were afforded a moment of quiet reflection at the beginning of each day in the public schools.[112]

According to the court, within the confines of this preamble, the Georgia legislature had explicitly stated a secular purpose for the Act, namely that a moment of reflection is beneficial to children.[113] Moreover, the Act itself, in subsection (b) proposed a secular topic to contemplate during the brief moment —the anticipated activities of the day. In fact, the same subsection expressly stated that this was not intended to be a moment of religious service.[114] Hence, the actual language of the Act emits only secular encouragement, while specifically prohibiting the use of the reflection time as a religious service.[115]

Second, the court reasoned that the legislative history demonstrates the secular purpose. Senator David Scott had originally introduced the statute as part of a "plan" of curbing violence among the city's youth.[116] In testimony before the court, Scott testified that violence and crime among and against the youth was his motivation for introducing this legislation.[117] He further testified that "'it was not an effort to bring prayer back into the schools.'"[118]

Bown, on the other hand, insisted that the legislative history indicated that the stated secular purpose of the Act was a sham. After the original bill had

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legislature because of the long tradition of offering prayer before each session. *See* Marsh v. Chambers, 463 U.S. 783, 785 (1983).

[112] Moment of Quiet Reflection in Schools, Act No. 770, § 1, 1994 Ga. Laws 256, 256 (1994).

[113] *See Bown*, 895 F. Supp. at 1574.

[114] *See id.*

[115] *See id.*

[116] *See id.* at 1567.

[117] *See id.* at 1574.

[118] *Id.*

passed the Senate, the bill eventually came up for vote in the House. House members introduced two amendments to the Senate version of the bill.[119] The Davis Amendment was twofold: (1) it provided for the present section (c) of the Act, allowing for student-initiated, voluntary prayer; and (2) it created a subsection (d) which permitted religious clubs to meet during non-school hours.[120] Thirty-six members of the House sponsored the Davis Amendment.[121] Both amendments passed the House and were sent to Conference Committee.[122] Additionally, Bown presented transcripts of the floor speeches of eight members of the House, all advocating the return of prayer into the public schools.[123] Because of the support for the Davis Amendment and the floor speeches calling for prayer to return to the classroom, Bown contended that the secular purpose was a sham.

The district court, on the other hand, dismissed these elements as mere "religious motives" of a few legislators.[124] The legislative motive of the statute was relevant, not the subjective motives of individual legislators. Additionally, the court noted that the *Lemon* test did not require a motivation that was wholly secular: "'[A] statute that is motivated in part by a religious purpose may satisfy the first criterion . . . .'"[125] A court should focus its inquiry on whether the primary purpose of the statute is secular, not whether one religious intent can be discovered.

Because the district court deemed the plain meaning of the language of the statute and the legislative history of the statute indicative of its secular purpose, the statute satisfied the first prong of the *Lemon* test.

2. *Primary Effect*

The court additionally found the second prong of the *Lemon* test, that of its primary effect, satisfied by considering subsection (c) of the statute, the legislative history, the language of the Act, and the administration of the Act

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119 *See id.* at 1568.

120 *See id.* The other amendment considered by the House extended the moment of reflection to 120 seconds from 60 seconds.

121 *See id.*

122 The conference committee removed the house amendments and sent the original version of the senate bill back to the house. The senate adopted the committee version, but the house rejected it. The bill then went to a second conference committee at which time only subsection (c) of the Davis Amendment was accepted. *See id.*

123 *See id.* at 1574.

124 *See id.* at 1576.

125 *Id.* (quoting Wallace v. Jaffree, 472 U.S. 38, 56 (1985)).

under the facts in this case.

Initially, the court noted that not every law making reference to prayer encourages or advances religion.[126] The consequence of the opposite conviction would be to invalidate the National Day of Prayer, the words "under God" in the pledge of allegiance, and the removal of "in God we trust" from currency.[127] Although the state should avoid wading into the pond of religion, complete and absolute separation of church and state is not possible because some intrusion of the state is inevitable.

The Establishment Clause, according to this court, was not intended to nullify all statutes which make reference to religion, but only those statutes which have the effect of "'*communicating a message of government endorsement or disapproval of religion.* It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.'"[128] Moreover, the court relied upon statements made by Justices Powell and O'Connor in their concurring opinions in *Jaffree*, as evidence of the permissive effect of the Georgia statute. In *Jaffree*, O'Connor hinted that moments of silence might be constitutional because they were not inherently religious, and a pupil may contemplate her own thoughts during the silence, without compromising her own religious beliefs.[129]

The Georgia statute does not "endorse" a religion in any way because the Moment of Quiet Reflection in Schools Act is not associated with a religious exercise. Subsection (b) of the Act makes it clear that pupils should not consider the moment of quiet reflection as a religious service.[130] The court then noted that the record was devoid of any oral or audible prayers during the moment of quiet reflection by any student or teacher.

Second, the court agreed with O'Connor's notion that during the moment of silence no child need compromise his belief. "This moment of silence act in no way favors the child who chooses to pray silently during a moment of silence over the child who chooses to reflect on secular activities or no

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[126] *See id.* at 1577.

[127] *See id*; *supra* notes 6–8 and accompanying text.

[128] *Id.* at 1578 (emphasis added) (quoting Lynch v. Donnelly, 465 U.S. 668, 692 (1983)).

[129] *See id.* at 1579 (quoting *Jaffree*, 472 U.S. at 72 (O'Connor, J., concurring)). Justice Powell, in his concurrence, strongly endorsed O'Connor's reasoning. *See Jaffree*, 472 U.S. at 62 (Powell, J., concurring).

[130] *See Bown*, 895 F. Supp. at 1579 (stating that a moment of silence "shall not be conducted as a religious service or exercise but shall be considered as an opportunity for a moment of silent reflection on the anticipated activities of the day." (quoting GA. CODE ANN. § 20-2-1050(b) (1996))).

activities at all for that matter."[131] The court gave credence to the concept of neutrality. In its assessment, the court concluded that neither the religious liberties of individuals nor the faint line separating church and state were violated. A room of silent individuals does not enhance religion.[132]

On the other hand, teacher Bown maintained that the Act was indeed violative of the Establishment Clause, because the addition of subsection (c) to the Act caused the state to endorse religion. Again, the court disagreed with Bown, asserting the constitutionality of (c) for three reasons.

First, subsection (c) affirmatively authorized nothing.[133] It neither implemented, favored, nor prohibited any activity, but rather only clarified that the moment of reflection did not prevent prayer. The secular purpose of the Act was actually strengthened by the inclusion of subsection (c), because it differentiated and separated the authorized moment of reflection from student-initiated prayer.[134]

Second, the court argued that the language of subsection (c) only clarified the previous two subsections, thereby not requiring student prayer.[135] This section of the statute merely states the type of prayer that will be tolerated. Nowhere within subsection (c) does the legislature provide for a requirement that students participate in prayer, a place for students to pray, the opportunity for students to pray, or the existence of circumstances under which the students are permitted to pray. The statute does not authorize students to lead other students in prayer or permit the faculty to participate in a prayer.[136] "The primary effect of subsection (c) is not to advance religion, or to convey a government message endorsing religion, in contravention of *Lemon's* second prong, but is only to clarify what subsections (a) and (b) do not prevent."[137]

Third, the court argued in the alternative that if subsection (c) actually did condone and endorse student-initiated prayer, it is still constitutionally sound because it is in a larger Act which concentrates on a moment of reflection to ponder the activities of the day.[138] Subsection (c) simply states that the Moment of Quiet Reflection in Schools Act does not prevent student-initiated prayer. Student-initiated prayer does not contravene Supreme Court precedence, for the Supreme Court has never held student-led prayer as violative of the

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131 *Id.*
132 *See id.* at 1579–81.
133 *See id.* at 1580.
134 *See id.* at 1580–81.
135 *See id.*
136 *See id.* at 1581.
137 *Id.*
138 *See id.*

Establishment Clause.[139] Indeed, the Fifth Circuit had already upheld the constitutionality of student-initiated graduation prayers.[140] Thus, this district court understood these decisions to indicate that the focus had moved from whether the student was voluntarily attending the school event to whether the student was attending the school event for a religious exercise.[141]

Subsection (c) does not state a place, a time, or circumstances under which students should pray. Nor does the subsection authorize or implement prayer into the school. It only recognizes that student-initiated prayer is not prevented by the statute.[142] Hence, "[t]here is little risk of official state endorsement or entanglement where the Act does not set forth any time or opportunity for such prayer, much less require or organize it."[143]

Because the Georgia statute is not associated with a religious exercise, because students do not compromise their religious beliefs by remaining silent during the moment of reflection, and because of the constitutionality of subsection (c), the Moment of Quiet Reflection in Schools Act does not have the effect of endorsing religion and thus satisfies the second branch of the tripartite *Lemon* test.

3. *Excessive Government Entanglement*

Finally, the court deemed the Moment of Quiet Reflection in Schools Act as not requiring excessive government entanglement. It primarily relied upon the same reasoning as stated in its evaluation of the "effect" prong of the *Lemon* test.[144]

Bown contended that excessive government entanglement would occur because subsection (c) alludes only to nonsectarian and nonproselytizing prayer. Bown asserted that the state, in this case school officials, would have to monitor, thus intervene, to ensure that silent prayers of students are indeed

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[139] *See id.* at 1581, 1582 & n.21 (construing Lee v. Weisman, 505 U.S. 577 (1992) (holding unconstitutional the practice of a principal or other school official from choosing a clergy to offer a prayer at graduation) and Board of Educ. v. Mergens, 496 U.S. 226 (1990) (upholding right of religious clubs to use public school facilities during nonschool hours)).

[140] *See id.* at 1582 n.23 (citing Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992)).

[141] *See id.* at 1583.

[142] *See id.*

[143] *Id.*

[144] *See id.* at 1583–84.

nonsectarian and nonproselytizing.[145] This intervention would create government entanglement. Moreover, Bown insisted that school officials would have to intervene to monitor the students' compliance with the Act, and guarantee that children are not audibly or orally reciting prayers.[146]

The court, on the other hand, deemed Bown's arguments as having no merit. First, Bown incorrectly expanded the Act beyond its limits. The Act did not prohibit any prayers not of a nonsectarian and nonproselytizing nature, but instead only stated that these types of prayers were permissible.[147] "Subsection (c) states only what the moment of silence does not prevent, but does not authorize, favor, or prohibit anything else."[148]

Second, Bown based his argument on *potential activities*, not actual ones. There existed in the record no instances of students orally or audibly reciting prayers. The Act only authorizes silence and further prohibits schools from conducting the silence as a religious exercise. In the words of the court, "The State of Georgia would risk greater entanglement by attempting to enforce a rule that prevented all student-initiated voluntary school prayer."[149]

Hence, because there was no evidence of the implementation of subsection (c) and because the subsection only functioned to state what the previous two sections did not prevent, there was no excessive government interference. The Moment of Quiet Reflection in Schools Act therefore satisfied the third prong of the *Lemon* test.

C. *Results*

The result of this decision is to hold that moments of silence do not violate the Establishment Clause of the First Amendment. According to this court, the Georgia statute clearly had a secular, legislative purpose, the effect of the statute was not to endorse religion, and excessive government entanglement was nonexistent. Accordingly, the Moment of Quiet Reflection in Schools Act satisfied all parts of the *Lemon* test.

As seen in Part IV of this Case Comment, the United States District Court for the Northern District of Georgia erred in its validation of the Moment of Quiet Reflection in Schools Act. The Act, as well as all legislatively mandated moments of silence in public schools, is inherently contrary to the aims of the Establishment Clause.

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145 *See id.* at 1584.
146 *See id.*
147 *See id.*
148 *Id.*
149 *Id.* at 1586.

IV. THE UNCONSTITUTIONALITY OF MOMENTS OF SILENCE

> We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but is also true, that the majority may trespass on the rights of the minority.[150]

Moments of silence in public schools are gaining popularity as a means of reinstituting prayer. Currently legislators in approximately twenty-five states have enacted statutes authorizing these moments in schools.[151] The Moment of Quiet Reflection in Schools Act is one instance of the majority trespassing on the rights of the minority. The remainder of this Case Comment examines the errors of the district court and definitively concludes that the statute is unconstitutional under the three-prong *Lemon* test.[152]

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[150] Madison, Memorial and Remonstrance, *supra* note 1, ¶ 1.

[151] Moment of silence statutes vary throughout the states. Some statutes mandate that all schools within the states allow for a period of silence or voluntary prayer, while other statutes allow individual school districts to use discretion in establishing these acts. Those statutes which authorize these moments at the state level are as follows: ALA. CODE § 16-1-20 (1995); DEL. CODE ANN. tit. 14, § 4101A(b) (Supp. 1995); ILL. ANN. STAT. ch. 105, § 20/1 (Smith-Hurd 1993); KAN. STAT. ANN. § 72-5308a (1992); MD. CODE ANN., EDUC. § 7-104 (1992 & Supp. 1995); MASS. GEN. LAWS ch. 71, § 1A (1994); NEV. REV. STAT. § 388.075 (1991); N.J. STAT. ANN. § 18A:36-4 (West 1989) (held unconstitutional in May v. Cooperman, 780 F.2d 240 (3d Cir. 1985), *appeal dismissed, sub nom.* Karcher v. May, 484 U.S. 72 (1987)); N.M. STAT. ANN. § 22-27-3 (Michie Supp. 1996); N.D. CENT. CODE § 15-47-30.1 (1995); TENN. CODE ANN. § 49-6-1004 (Supp. 1995). Those statutes allowing local school boards to establish periods of silence are as follows: ARIZ. REV. STAT. ANN. § 15-342(21) (Supp. 1995); CONN. GEN. STAT. § 10-16a (1995); FLA. STAT. ANN. § 233.062(2) (West 1989); IND. CODE § 20-10.1-7-11 (1995); LA. REV. STAT. ANN. § 17:2115 (West Supp. 1996); ME. REV. STAT. ANN. tit. 20-A, § 4805(2) (West 1993); MICH. COMP. LAWS § 380.1565 (1988); N.Y. EDUC. LAW § 3029-a (McKinney 1995); N.C. GEN. STAT. § 115C-47(29) (Supp. 1995); 24 PA. CONS. STAT. ANN. § 15-1516.1 (1992); TEX. EDUC. CODE ANN. § 25.082(b) (West Supp. 1996); VA. CODE ANN. § 22.1-203 (Michie 1993).

[152] Notwithstanding recent Supreme Court opinions casting doubt on the future of the *Lemon* test, the Eleventh Circuit continues to use the *Lemon* test as the correct method in determining violations of the Establishment Clause. *See* Jager v. Douglas County Sch. Dist., 862 F.2d 824, 828 (11th Cir. 1989).

A. *Secular Purpose*[153]

In order to pass constitutional muster under this first prong of the tripartite *Lemon* test, the statute must not possess an actual purpose which "endorse[s] or disapprove[s] of religion."[154] A law is not unconstitutional just because its purpose "merely happens to coincide or harmonize with the tenets of some or all religions,"[155] nor is a law which "confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions" unconstitutional for that purpose, alone.[156] A law does not even require an *exclusive* secular objective.[157] The state must only be able to justify the action in secular terms.[158] Although the single statements of a legislator inserted into the record should not invalidate an otherwise secular bill,[159] courts must scrutinize stated legislative purposes to ensure that the secular purpose is not a sham.[160] "The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools."[161]

Georgia's Moment of Quiet Reflection in Public Schools Act possesses a religious purpose, namely to reinstitute prayer into the public schools. Although the preamble to the Act states a secular purpose, the legislative intent, the insertion of subsection (c) into the Act, the time of day set aside for the

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[153] Two problems may exist with invalidating laws based on the existence of religious purpose. First, a law with a religious purpose may be used to invalidate laws whose affects are wholly secular. Second, the lack of a secular purpose might invalidate acts of legislatures which aim to "equalize religious burdens or otherwise to advance free exercise values." TRIBE, *supra* note 9, § 14-9, at 1211.

[154] Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) ("The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.")).

[155] McGowan v. Maryland, 366 U.S. 420, 442 (1961).

[156] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973) (citations omitted).

[157] *See Jaffree*, 472 U.S. at 56, 64 (Powell, J., concurring).

[158] *See* TRIBE, *supra* note 9, § 14-8, at 1204.

[159] *See Jaffree*, 472 U.S. at 65 (Powell, J., concurring).

[160] *See id.* at 75 (O'Connor, J., concurring); Stone v. Graham, 449 U.S. 39 (1980) (finding stated legislative purpose for statute requiring posting of Ten Commandments in public classrooms a sham).

[161] *Jaffree*, 472 U.S. at 76 (O'Connor, J., concurring).

moment of silence, the legislative history, and the operative effect of the Act indicate otherwise.

First, the legislative intent stated by Georgia's state legislature is a sham, disguising the actual religious intent of the Act. The Supreme Court has recognized the existence of sham purposes and has stated that an "avowed" secular purpose is able to violate the Establishment Clause.[162] In *Stone v. Graham*,[163] the Court invalidated a Kentucky statute requiring the posting of the Ten Commandments in every public classroom within the state.[164] Kentucky argued that the statute possessed a secular purpose, because the legislature had required each posting to contain wording that indicated nonreligious means for the display.[165] The Court reasoned, however, that posting the Ten Commandments was clearly for religious purposes, for the Decalogue is seen as a symbolic and sacred part of the Judeo-Christian belief system.[166] Within the words of the Commandments themselves are contained the religious duties of worshippers. Additionally, the Court noted that this was not an instance where the schools were using the Bible to study history, cultures, or religion. "If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause."[167]

Like the stated legislative purpose for the display of the Ten Commandments in *Graham*, the actual purpose of Georgia's Moment of Quiet Reflection Act is one of religious endorsement. "Prayer" is solely a religious activity, for there exists no nonreligious purpose for prayer.[168] The Bible, the

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[162] *See Graham*, 449 U.S. at 41–42; *see also Jaffree*, 472 U.S. at 75 (O'Connor, J., concurring).

[163] 449 U.S. 39 (1980).

[164] *See id.* at 39–40.

[165] "'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'" *Id.* at 41 (quoting KY. REV. STAT. ANN. § 158.178(2) (Michie 1992)).

[166] *See id.*

[167] *Id.* at 42.

[168] *See* Engel v. Vitale, 370 U.S. 421, 424–25 (1962) ("'The religious nature of prayer was recognized by Jefferson and has been concurred in by theological writers, the United States Supreme Court and state courts and administrative officials . . . .'") (quoting Engel v. Vitale, 191 N.Y.S.2d 453, 468-69 (N.Y. Sup. Ct. 1959)); Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 335 (1963) ("[O]ther practices, such as prayer recitation and Bible reading, *must be fairly characterized as solely religious activities having no independent primary nonreligious*

principle text upon which the Christian faith relies, states the importance of prayer in the Christian faith.[169] Moreover, in subsection (c) of the Act of the Georgia state legislature, the legislature makes clear that prayer is not prohibited during that moment of quiet reflection each morning.[170] Explaining to school districts, teachers, and students that prayer is not prohibited during a moment of silence singles out the nonsecular act of one religion. Why does subsection (c) of the statute not stipulate that those of the Buddhist faith may meditate to Buddha during this period? Like the posting of the Ten Commandments in *Graham*, the singling out of prayer, if it is to have any effect at all, "it will be to induce the schoolchildren" to worship the Christian God, possibly to introduce them to the Bible, and possibly even to convert a non-Christian to Christianity. Moreover, aside from converting a non-Christian to a Christian, the recognition of prayer encourages religion over nonreligion.[171] This encouragement is equally as contrary to the aims of the First Amendment. "However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause."[172]

Hence, the inherent nature of prayer indicates a religious purpose. Because the Moment of Quiet Reflection in Public Schools Act singles out prayer as one activity not prohibited by the statute, the legislature has indicated prayer as a favored activity within that time span. A religious purpose is thus expressed.

Second, the addition of subsection (c) to the Moment of Quiet Reflection in Schools Act serves no purpose other than to encourage religion. In *Wallace v. Jaffree*, the Court was confronted with a similar moment of silence statute in Alabama.[173] The specific statute at issue calling for "'meditation or voluntary

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purpose. Their exclusive primary goal is to inculcate the students with religious and spiritual ideals or to assist in such inculcation.").

[169] *See Matthew* 21:22 ("And whatever you ask in prayer, you will receive if you have faith."); *cf.* School Dist. v. Schempp, 374 U.S. 203, 224 (1963) (stating the inherent relationship between the Bible and religion).

[170] For text of the Moment of Quiet Reflection in Schools Act, see *supra* text accompanying note 99.

[171] Encouraging religion over nonreligion is seemingly as contrary to the aims of the Establishment Clause as encouraging one religion over another. *See* Everson v. Board of Educ., 330 U.S. 1, 15–16 (1947) (stating no state or federal government has the power through the Establishment Clause to encourage religion); Lee v. Weisman, 560 U.S. 577 (1992) (invalidating administration-led graduation prayer, because, inter alia, it would force a nonbeliever to participate in religious orthodoxy).

[172] *See* Stone v. Graham, 449 U.S. 39, 42 (1980).

[173] Wallace v. Jaffree, 472 U.S. 38, 40 (1985). The text of the statute called for a moment of silence "'not to exceed one minute in duration . . . for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.'" *Id.* at 40 n.2

prayer'" was identical to the statute it replaced in every respect, with the exception of the addition of the words "'or voluntary prayer.'"[174] The Court reasoned that the right of voluntary prayer already existed in the previous statute, for there was no language preventing a student from voluntarily praying.[175] The amending of the statute to provide for "voluntary prayer," the Court continued, could only be the result of one of two possibilities: (1) to convey a message of state endorsement and promotion of prayer; or (2) the statute was enacted for no purpose.[176] Because no party claimed that the legislature had irrationally enacted the meditation statute for no reason, the only plausible purpose for the addition of subsection (c) was for religious encouragement.[177]

In the same respect as the statute enacted in *Jaffree*, there was no need for the amendment allowing for subsection (c) of Georgia's Moment of Quiet Reflection in Schools Act. The original bill proposed and passed by the Senate contained only subsections (a) and (b). No preamble was attached, nor any language stating that prayer was not prevented during the opening moment of silence. The statute simply stated that each day a moment of quiet reflection existed during which students were to reflect on the activities of the day.[178] According to the preamble, added concurrently with subsection (c), the General Assembly enacted the law because "our young, and society as a whole, would be well served if students were afforded a moment of quiet reflection at the beginning of each school day in the public schools."[179] Accepting arguendo, that the stated legislative purpose is the true intent of the law, then no change in intent occurred with the addition of subsection (c) discussing the non-prohibition of prayer. Like the addition of the statute in *Jaffree*, the addition of subsection (c) demonstrates a desire to "characterize prayer as a favored practice."[180]

Moreover, individual, student-initiated prayer and religious expression is already permissible within the public schools, as long as it is not disruptive to others.[181] In 1995, President Clinton issued to Attorney General Janet Reno a

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(quoting ALA. CODE § 16-1-20.1 (Supp. 1984)).

[174] *Id.* at 58–59.

[175] *See id.*

[176] *See id.* at 59.

[177] *See id.*

[178] *See supra* text accompanying note 98 for subsections (a) and (b) of the statute.

[179] For text of the preamble, see *supra* note 112 and accompanying text.

[180] *Jaffree*, 472 U.S. at 58–59.

[181] *See* Board of Educ. v. Mergens, 496 U.S. 226, 246–47 (1990) (allowing student religious organizations equal access to school facilities after school hours as nonreligious organizations); Zorach v. Clauson, 343 U.S. 306, 314–15 (1952) (allowing release of students from public schools to attend off-campus religious services). *But see* Illinois *ex. rel.*

memorandum concerning religious expression in the schools.[182] Commanding Attorney General Reno to inform school districts about religion in the schools, the President explained the freedom that does exist:

> The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable nondisruptive activities. Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not discriminate against religious activity or speech.[183]

The President continued, stating that the right to exercise religious beliefs in schools does not include the right to "have a captive audience listen or to compel other students to participate."[184] Thus, according to the President's understanding, students have a right to pray in schools, if they so choose. They may not, however, force others to join.

By the addition of subsection (c) to the Moment of Quiet Reflection in Schools Act, nothing was accomplished. As discovered through Supreme Court precedent and the Presidential Memorandum, students already had the right to pray during school hours, as long as prayer was not part of the official school day. Using the reasoning of the *Jaffree* Court, there are only two possible reasons for the inclusion of subsection (c): "(1) the statute was enacted to convey a message of state endorsement and promotion of prayer; or (2) the statute was enacted for no purpose."[185] As in *Jaffree*, no one in the present case has stated that subsection (c) was enacted for no reason. Hence, only one explanation exists for its addition: the state endorsement of prayer.

Because the stated purpose of the statute was the same before and after the addition of subsection (c) to the Moment of Quiet Reflection in Schools Act, the only rational explanation for its existence is to promote prayer.

Third, the legislative history of the Moment of Quiet Reflection in Schools Act reveals the Act's actual nonsecular intent. Remembering that the comments of one or a few legislators carefully placed within the record should not be able

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McCollum v. Board of Educ., 333 U.S. 203, 227–28 (1948) (denying release of students from secular studies to attend religious classes on school premises, during school hours).

[182] President's Memorandum on Religious Expression in Schools, 31 WEEKLY COMP. PRES. DOC. 1227 (July 12, 1995).

[183] *Id.* at 1228.

[184] *Id.*

[185] Wallace v. Jaffree, 472 U.S. 38, 59 (1985).

to invalidate the existence of a secular purpose,[186] the courts have searched the history behind the enactment of "moment of silence" statutes in an effort to discover a secular purpose. An examination of the statute in the present case additionally demonstrates the existence of a religious purpose.[187]

The original senate bill, as introduced by Senator Scott, called for school prayer in the classroom.[188] According to Scott, himself, the only reason the legislature removed the reference to "silent prayer" was to increase the possibility of its surviving constitutional scrutiny.[189] One might reasonably discern from this action that Scott saw no objection to prayer in the public schools when he introduced the bill. Why else would he not remove the reference to prayer at the bill's introduction? Prayer is certainly not necessary to "reflect on the day's activities." The possibility exists that Scott approved of prayer in schools, and only removed the reference to prayer in order to make the bill more appeasing to the Establishment Clause.[190]

Additionally, the Georgia House of Representatives made no secret of their purpose to return prayer to the public classroom. When the house first introduced Senate Bill 396, the representatives inserted two amendments before passing the measure.[191] The Davis Amendment provided for, inter alia, the present subsection (c) stating the nonprohibition of voluntary prayer during the moment of quiet reflection.[192] Despite the efforts of the house sponsors of

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[186] *See id.* at 65 (Powell, J., concurring).

[187] Although the district court made note of a recorded floor debate in the Georgia House of Representatives, the author was unsuccessful in locating it. The author contacted both the district court and the house, and neither place was able to give assistance. The author must therefore rely on secondary sources in discussing the legislative history of the Moment of Quiet Reflection in Schools Act.

[188] *See* Leila Ann G. Lawlor, *Elementary, Secondary, and Adult Education: Require a Moment of Quiet Reflection at the Opening of Each School Day; Prevent Prohibition of Student-Initiated, Voluntary Prayer at Schools and School-Related Events*, 11 GA. ST. U. L. REV. 187 (1994); John Sommer, *'Quiet Reflection' Bill Way to Curb Violence or Avenue for Prayer? Public Debate Rages on 32 Years After Landmark Supreme Court Decision*, ATLANTA J. & CONST., Feb. 20, 1994, at J9; *see also* Bill Rankin, *Meditation in School Georgia Plan Could Get Nod from High Court*, ATLANTA J. & CONST., Feb. 22, 1994, at A5 (ACLU noting the irony of Georgia altering a statute which initially called for voluntary school prayer).

[189] *See* Lawlor, *supra* note 188, at 190.

[190] *Cf.* Wallace v. Jaffree, 472 U.S. 38, 56–57 (1985) (noting that the sponsor of the proposed Alabama moment of silence statute expressly stated in the record that the bill was an effort to return prayer to the public schools).

[191] *See supra* notes 119–22 and accompanying text.

[192] *See* Bown v. Gwinnett County Sch. Dist., 895 F. Supp. 1564, 1568 (N.D. Ga. 1995); Lawlor, *supra* note 188, at 191 (noting that "many representatives insisted the bill

Senate Bill 396 to steer floor debate away from the issue of prayer, the house overwhelmingly desired a reference to prayer.[193] "House members . . . offered up fiery speeches linking the end of school prayer to a drop in test scores and rising crime."[194] According to the district court, at least eight representatives orated in support of reintroducing prayer into the public classrooms.[195]

The Georgia House of Representatives overwhelmingly supported the Davis Amendment referring to school prayer by a 119 to 48 vote.[196] The passage of the Davis Amendment is indicative of the house's intent to restore prayer into the public schools. This affirmance, combined with the orations by many representatives linking the silence to prayer, demonstrates that this is not an instance of a single legislator inserting comments into the record,[197] but rather an instance of the majority of representatives supporting the re-emergence of prayer in public schools.

The house approved Senate Bill 396 with the inclusion of the Davis Amendment by a 164 to 10 vote.[198] The senate, however, rejected the house's version of the bill and returned it to the house as it originally existed without the amendments. The house then rejected the senate version by a vote of 75 to 94.[199] The defeat of the conference committee's bill suggests that the majority of the house were in support of the Davis Amendment which contained a blatant religious purpose.

Once the bill emerged from a second conference committee with part of the Davis Amendment intact, the house finally approved the Moment of Quiet Reflection in Schools Act.[200]

The original version of Senate Bill 396, the house floor debates calling for the return of prayer in the public classroom, and the house insistence on the inclusion of the Davis Amendment in the final version of the bill all indicate the religious purpose of the moment of quiet reflection.

Fourth, the time of day reserved for the moment of quiet reflection proffered in the Act, is indicative of an effort to reintroduce prayer into the

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contain some reference to school prayer and refused to pass the bill as written").

193 *See* Ben Smith III & Charles Walston, *Bill Allowing Student Led Prayers in School Clears Georgia House*, ATLANTA J. & CONST., Mar. 4, 1994, at A1.

194 Betsy White, *Georgia's Moment of Reflection Crash Course in Quiet: Teachers are Troubled About Possible Lawsuits and Reflect on Ways to Prevent Them*, ATLANTA J. & CONST., Aug. 18, 1994, at C1.

195 *See Bown*, 895 F. Supp. at 1575.

196 *See* Smith & Walston, *supra* note 193, at A1.

197 *See supra* notes 155-60 and accompanying text.

198 *See* Smith & Walston, *supra* note 193, at A1.

199 *See Bown*, 895 F. Supp. at 1568.

200 *See id.*

schools.[201] "[A] statute that requires or permits a moment of silence to occur at precisely the same time of day at which prayer previously occurred evinces a religious purpose."[202] Since the Civil War, religion was manifested into the public schools, through prayer, during the opening moments of the day.[203] Indeed, the challenged prayers in *Engel*, *Schempp*, and *Jaffree* all occurred during the morning exercises.[204] Providing for moments of silence within this same period is nothing more than an effort to reestablish prayer in the public schools.

In this same way, the state of Georgia, prior to the current moment of reflection act, authorized prayer in the morning exercises of the school day.[205] Although the Georgia legislature repealed this law, they installed the current Moment of Quiet Reflection in Schools Act in its place. The moment of quiet reflection act also requires silence at the same time prayer was traditionally allowed: the commencement of the school day. Conceivably, the Georgia legislature could have indicated any part of the day to maintain quiet reflection, but chose to require the moment during the traditional time for prayer.[206] The requirement for the moment of quiet reflection to occur at precisely the traditional time for school prayer is yet a third indicia of a nonsecular purpose.

And finally, the operative effect of Georgia's Moment of Quiet Reflection in Schools Act demonstrates the religious intent of the bill. "[S]ecular purpose is most effectively tested by reference to the actual impact of a legislative action: if the obvious effect of a statute is to advance or hinder a particular religious interest, then the state's purpose is necessarily less believably

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[201] *See* Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 HARV. L. REV. 1874, 1881 (1983).

[202] *Id.*

[203] *See id.* at n.44 (citing W. GRIFFITHS, RELIGION, THE COURTS AND THE PUBLIC SCHOOLS §§ 1.1-2.4 (1966)).

[204] *See* Wallace v. Jaffree, 472 U.S. 38, 40 nn.1–3 (1985); School Dist. v. Schempp, 374 U.S. 203, 205 (1963); Engel v. Vitale, 370 U.S. 421, 422 (1962); *see also* Beck v. McElrath, 548 F. Supp. 1161, 1161 (M.D. Tenn. 1982), *vacated, sub nom.* Beck v. Alexander, 718 F.2d 1098 (6th Cir. 1983) (challenging a morning moment of silence in public schools). *But see* Lee v. Weisman, 505 U.S. 577, 580 (1992) (challenging an administration-initiated graduation prayer).

[205] *See supra* note 98 for the text of the law which was repealed and replaced by the challenged statute.

[206] *See* Note, *supra* note 201, at 1881 ("A moment of silence for a secular purpose might logically have been mandated at any of a number of points in the day, such as following recess or lunchtime, or the timing might simply have been left to the discretion of the teacher.").

secular."[207] Although the Court has not employed this test in many Establishment Clause challenges, it has used this operative effect test in at least one case.[208]

The *McGowan* Court reasoned that Sunday closing laws were constitutional after examining the purpose of closing laws in society at that time:

> We do not hold that Sunday legislation may not be a violation of the Establishment Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion.[209]

This type of analysis for Establishment Clause challenges is necessary, because the First Amendment rights are fundamental in the United States' constitutional system.[210]

The effect of Georgia's Moment of Quiet Reflection in Schools Act is to promote religion in public schools. The influence of legislation of this nature is likely to be interpreted as a religious ritual in the southern United States, regardless of the other language of the statute. In a poll completed in 1994, nearly half of all Southerners believed that the United States was a Christian nation, compared to only one third outside of the South who agreed with this statement.[211] In the Deep South, 53% of the respondents believed that Christian laws should govern the United States, and 80% of Southerners—as opposed to 60% of non-Southerners—believe that Jesus will revisit the Earth.[212] Because the South has deep religious convictions, the operative effect of the statute in Georgia is to "advance . . . a particular religious . . . interest."

The religious nature of the statute is additionally seen in the reaction by the citizens of Georgia. Religious leaders hailed the Moment of Quiet Reflection in Schools Act as a "godsend" for Christian children in the public schools and

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[207] Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 824–25 (1978).

[208] *See* McGowan v. Maryland, 366 U.S. 420, 453 (1960). For the facts of *McGowan*, see *supra* note 42.

[209] *Id.*

[210] *See* Merel, *supra* note 207, at 827 ("[A]t least some degree of *means* scrutiny should be required in order to prevent any unnecessary effects in matters of religion.").

[211] *See* Ben Smith, *God and the South: Southern Life Poll*, ATLANTA J. & CONST., May 22, 1994, at A8.

[212] *See id.*

urged parents to provide prayers to their children for the moment of silence.[213] A few students in Brian Bown's classroom placed Bibles on their desks to read during the moment of silence.[214] Another student bowed her head in prayer.[215] The motive of the law was questioned by the legislators' very constituents.[216] Hence, the operative effect of the Moment of Quiet Reflection in Schools Act is to promote religion in the public schools through prayer.

Because the nature of prayer is inherently religious, the addition of subsection (c) serves only to emphasize prayer as a favored action, the moment of reflection is at the traditional time of prayer, and the operative effect is to influence religion in individuals' lives, the Moment of Quiet Reflection in Schools Act possesses a nonsecular purpose.

B. *Primary Effect*

The second factor of the three-prong *Lemon* test is the requirement that the primary effect of the challenged statute be secular. Courts should invalidate policies which have the central effect of either positively or negatively influencing religion.[217] Although, as a practical matter, a statute may have the primary effect of causing the inhibition of or advancement of religion, the test must evaluate if the government practice advances a message of government endorsement or disapproval of religion.[218] "It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community."[219]

Georgia's Moment of Quiet Reflection in Schools Act does advance a message of governmental endorsement of Christianity. Examination of the effect of the statute should go beyond the mere study of the language of the statute to the actual effect on those individuals within its jurisdiction.[220] By questioning the effect of the moment of reflection on the schools, the classroom

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[213] *See* Diane Loupe, *Christian Workshop Leaders See Law as Welcome First Step*, ATLANTA J. & CONST., Aug. 27, 1994, at J1.

[214] *See* Bown v. Gwinnett County Sch. Dist., 895 F. Supp. 1564, 1569–70 (1995).

[215] *See id*; *see also* Loupe, *supra* note 213, at J1.

[216] *See* Jerry L. Brantley, Jr., *Southside Voices Readers' Letters*, ATLANTA J. & CONST., Sept. 15, 1994, at I6; John Sommer, *Moment of Silence All's Not Quiet on the School Front*, ATLANTA J. & CONST., Sept. 4, 1994, at J13; Sommer, *supra* note 188, at J9.

[217] *See* TRIBE, *supra* note 9, § 14-10, at 1214.

[218] *See* Lynch v. Donnelly, 465 U.S. 668, 691–92 (1984).

[219] *Id.* at 692.

[220] *See* Note, *supra* note 201, at 1888.

teacher, and the students, one can discern the governmental endorsement of religion.[221]

First, state compulsory education laws demonstrate the governmental endorsement of religion in the Moment of Quiet Reflection in Schools Act.[222] In *McCollum*, the Court considered an Illinois statute providing for the release of students from their secular studies during school hours, in order to attend religious classes. Those students not desiring to take part in the religious classes were permitted to pursue secular subjects in another part of the school.[223] In declaring the statute unconstitutional, the Court noted the close connection between the religious instruction and the school authorities. The school was providing tax-supported property to encourage and spread religious faith to the students of the school.[224] These same students were compelled by state law to attend school. "The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects."[225] Moreover, the Court cited with approval the broad prohibition expounded by the *Everson* Court demanding complete and absolute separation of state and religion.[226] In his concurring opinion, Justice Frankfurter addressed the "alternative" available for students wishing not to take part in the religious training. He reasoned that the existence of an alternative did not necessarily lessen the influence of the school's practice on the child.[227] The result is a pressure to conform to the majority and attend the religious classes.[228]

Like the statute in *McCollum*, the Moment of Quiet Reflection in Schools Act is using the state's compulsory education laws to inculcate school children with pressure to pray during the moment of reflection at the commencement of the school day. First, the compulsory education law of the state of Georgia forces a nonreligious, non-Christian, or non-praying religious person to endure a moment of silence allowing for religious individuals to pray. By permitting Christian students to pray during this period, the government, through the school, assists religious individuals with time to pray "through use of the state's compulsory public school machinery. This assistance is not a separation

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221 *See id.* at 1888–93.

222 *See id.*

223 *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 205 (1948).

224 *See id.* at 209–10.

225 *Id.* at 209.

226 *See id.* at 210–11 & nn.6–7.

227 *See id.* at 227 (Frankfurter, J., concurring).

228 *See id.*

of Church and State."[229] As noted earlier, the addition of subsection (c) into the Georgia statute served no purpose but to further religion.[230] Under the Free Exercise Clause, the government already may not prohibit a student from praying at any time during the day.[231] Hence, the addition of subsection (c) singles out prayer as a preferred, endorsed, government action during the moment of reflection. In this way, the state is employing "the tax-established and tax-supported public school system to aid religious groups to spread their faith."[232]

Because of the compulsory education laws, students are forced to endure the moment of silence imposed upon them in the public schools. By singling out "prayer" as an acceptable activity within the moment of reflection, the Georgia legislature has created and endorses a religious atmosphere in the school.

Second, the classroom teacher, more than any other person in the public school, has a great influence on the daily lives of the students. To the students, the teacher is representative of the "established order," deserving respect and reverence because of her position.[233] Merely by reciting the words of the statute to the student, the teacher can inadvertently promote religion.

Children of the elementary or high school age are unusually susceptible to influence on religious choice.[234] In *Duffy v. Las Cruces Public Schools*, the district court dealt with a New Mexico statute authorizing individual school

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[229] *Id.* at 212.

[230] *See supra* notes 173–84 and accompanying text.

[231] *See supra* notes 181–82 and accompanying text.

[232] *See McCollum*, 333 U.S. at 210.

[233] *See* Note, *supra* note 201, at 1889 n.89 (construing R. DAWSON, ET AL., POLITICAL SOCIALIZATION 149–50 (2d ed. 1977)).

[234] *See* Lubbock Civil Liberties Union v. Lubbock Ind. Sch. Dist., 669 F.2d 1038, 1045 (5th Cir. 1982) (noting the "impressionability of secondary and *primary* age school children"); Collins v. Chandler Unified Sch. Dist., 644 F.2d 759, 762 (9th Cir. 1981) ("[S]ecular involvement in religious activities in the institutionally coercive setting of primary and secondary schools, then, is alone sufficient to satisfy this prong of the *Lemon v. Kurtzman* test."); Brandon v. Board of Educ., 635 F.2d 971, 978 (2d Cir. 1980) ("Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed."); Duffy v. Las Cruces Pub. Sch., 557 F. Supp. 1013, 1016 (D.N.M. 1983) ("The dangers inherent in the sovereign placing its imprimatur on a religious exercise are particularly acute where children are involved."); Choper, *supra* note 168, at 337.

districts to establish moments of silence within their own districts.[235] In its invalidation of the statute, the court examined the perceived effect of the statute on the students. The court noted that if the community perceived the enactment of the statute to be a religious exercise, then the State had advanced religion.[236] In examining the effect of the policy to discover if the school board had furthered or inhibited religion, the court understood the importance of perception: "The debates leading to the adoption of the moment of silence left the clear impression that the issue was prayer in the public schools in the minds of both its supporters and opponents."[237] This impression, when combined with the impressionable minds of the elementary and high school youth, created an impermissible advancement of religion.[238]

Like the statute in *Duffy*, the Moment of Quiet Reflection in Schools Act encountered much debate before its actual implementation.[239] Both proponents and opponents of the moment of quiet reflection tended to equate the statute with prayer. Thus, on the first day of class, many students interpreted Brian Bown's refusal to allow the moment of silence as a refusal to allow prayer.[240] Teachers were also seen in prayer. These facts, combined with the religious nature of the South,[241] creates the effect of the advancement of religion in the minds of the impressionable youth.

Third, the effect of the moment of silence is to indirectly coerce nonreligious individuals into a religious conformance by the state.[242] Like the prayer dissenters in *Lee v. Weisman*,[243] students in Georgia should not feel

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[235] The text of the New Mexico statute stated the following:

> Each local school board may authorize a period of silence not to exceed one minute at the beginning of the school day. This period may be used for contemplation, meditation or prayer, provided that silence is maintained and no activities are undertaken.

Duffy, 557 F. Supp. at 1014 (quoting N.M. STAT. ANN. § 22-5-4.1 (Michie 1978)).

[236] *See id.* at 1016.

[237] *Id.* at 1020.

[238] *See id.* at 1020–21.

[239] *See supra* notes 186–206 and accompanying text.

[240] One student stated that Bown's actions prevented her from praying. Another student ran out of Bown's afternoon class shouting, "'the Lord Jesus is my Savior.'" Two students in Bown's homeroom placed Bibles on their desk. A teacher bowed his head in prayer. *See* Diane Loupe, *South Teacher Breaks Silence with Protest*, ATLANTA J. & CONST., Aug. 23, 1994, at J1.

[241] *See supra* notes 211–12.

[242] *See supra* notes 92–95 and accompanying text.

[243] *See* 505 U.S. 577, 593 (1992); *supra* notes 85–95 and accompanying text.

compelled to pray during this morning minute of silence. "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbelievers or dissenters to be an attempt to employ the machinery of the state to enforce a religious orthodoxy."[244] The mere act of remaining silent for a minute while giving others the opportunity to pray, in essence, forces the dissenter to participate in religion. The fact that the state of Georgia is setting time apart from the school day to allow prayer to take place subtly coerces a nonbelieving student towards religion.

Because of Georgia's state compulsory education laws, the impressionable nature of children, the religious interpretation of the statute by students and teachers, and the subtle coercion towards religion, the effect of the Moment of Quiet Reflection in Schools Act was to advance religion. The district court erred in declaring the act constitutional.

C. *Excessive Government Entanglement*

The third and final prong of the *Lemon* test fosters excessive governmental entanglement into religious issues.[245] Excessive governmental entanglement addresses the Madisonian view that religious and secular bodies should not interfere within the sphere of authority of the other.[246] In creating a statute respecting religion, Congress must not provide for excessive involvement of the government nor a continuing role for official and constant surveillance.[247] The question of entanglement is one of degree, and normally appears in the form of administrative entanglement or political divisiveness.[248] Mandatory moments of silence in public schools foster this excessive governmental entanglement. Georgia's Moment of Quiet Reflection in Schools Act violates

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[244] *Id.*

[245] *See* Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

[246] *See* TRIBE, *supra* note 9, § 14-11, at 1226.

[247] *See* Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970).

[248] *See Lemon*, 403 U.S. at 615, 622; TRIBE, *supra* note 9, § 14-11, at 1229-30 n.31; *see also* Note, *supra* note 201, at 1878 n.28. Although one could make the argument that political divisiveness on a religious level does exist on account of the statute, the Supreme Court has been reluctant in extending this doctrine to non-monetary policies. *See* Lynch v. Donnelly, 465 U.S. 668, 684 (1984); Mueller v. Allen, 463 U.S. 388, 403 (1983). *But see* Duffy v. Las Cruces Pub. Sch., 557 F. Supp. 1013, 1021 (D.N.M. 1983) (finding political divisiveness as an element of excessive governmental entanglement, thereby invalidating a state moment of silence law).

the prohibition of excessive governmental entanglement in the administrative aspect.

The moment of quiet reflection requires administrative entanglement because it requires governmental surveillance, monitoring, and administration in the observance of the moment. As stated earlier, the two statutes at issue in *Lemon* concerned (1) state authorization to supplement the salary of a non-public school teacher in her instruction in secular courses, and (2) state authorization to supplement nonpublic schools for the expenses associated with salaries, textbooks, and instructional materials for secular courses.[249] In determining that both statutes did indeed involve excessive governmental entanglement, and thus violated the Establishment Clause, the Court first concentrated on the necessary administrative surveillance.

After noting the close relationship between religion and parochial schools, the Court reasoned that surveillance was necessary in order to assure that teachers who received the salary supplement did not teach religious ideals whatsoever in their secular subjects. A potential hazard existed in which teachers of secular subjects could inject religious doctrine into their secular teachings.[250] Combined with the impressionable age of students, the potential for religious indoctrination would require governmental surveillance. The Court recognized the difficulty for religious individuals to teach secular subjects without inserting, even subconsciously, religious ideals.[251] Moreover, there was inherent difficulty in "the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions."[252] In order to assuage these concerns, state surveillance was necessary to ensure no violation of the Establishment Clause and teacher obedience with the statute.[253] This surveillance is the very type of administrative entanglement prohibited by the First Amendment.

Like the statutes in *Lemon*, Georgia's Moment of Quiet Reflection in Schools Act requires state surveillance to ensure no violation of the statute for two reasons. First, Gwinnett County School District in Georgia promulgated an administrative bulletin describing to all teachers how to handle the moment of reflection each morning.[254] In part, the bulletin described the correct procedure

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[249] *See Lemon*, 403 U.S. at 607, 609.

[250] *See id.* at 618.

[251] "What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion." *Id* at 619.

[252] *Id.*

[253] *See id.*

[254] *See* Bown v. Gwinnett County Sch. Dist., 895 F. Supp. 1564, 1569 (N.D. Ga. 1995); *see also* Diane Loupe, *Silence Golden in Moment of Reflection*, ATLANTA J. &

teachers should follow each day and suggested answers to probable questions of students concerning the religious undertone of the statute. The bulletin, however, additionally noted the necessity of teachers not to suggest or imply that this time was to be used for prayer: "It is important that we recommend that teachers and administrators do not suggest or imply that students should or should not use that time for prayer."[255]

The administrative bulletin is not the only evidence of governmental entanglement into religion caused by the statute. Fulton County, Georgia issued a script to be followed each day,[256] as did Gwinnett County,[257] and even the Georgia School Board Association issued recommendations that individual schools not permit teachers, staff, or students to pray audibly.[258] Moreover, school attorneys and administrators issued legal advice on the proper way to conduct the moment of quiet reflection.[259]

Although this prohibition of suggesting prayer exists, some teachers who are very religious may imply prayer from their actions. For example, a math teacher in Brian Bown's school "bowed his head and closed his eyes during the moment."[260] These actions by this math teacher are the universal sign of prayer, a religious activity.[261] As the *Lemon* Court noted, children are at a very impressionable age and may be easily influenced by the actions of a teacher.[262] Despite the attempts to avoid staff and administrator endorsement of prayer, and therefore religion, the very thing the *Lemon* Court feared has occurred: religious individuals who are teachers still display religious indoctrination. As an editorial by the *Atlanta Journal and Constitution* stated: "Who will police teachers in the state's 1,717 public schools to make sure they

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CONST., Aug. 22, 1994, at J1.

[255] *Bown*, 895 F. Supp. at 1569. The bulletin continued, stating: "If a student asks, a teacher should advise student that if the student desires to have a quiet prayer, he or she may do so." *Id.*

[256] "We will now pause for the next forty seconds for a brief period of quiet reflection," and then after the forty seconds has expired, "Thank you. Have a good day." Betsy White, *Georgia's Moment of Reflection Crash Course in Quiet*, ATLANTA J. & CONST., Aug. 18, 1994, at C1.

[257] "'As we begin our day, let us take a few moments to reflect quietly on our day, our activities and what we hope to accomplish.'" *Bown*, 895 F. Supp. at 1569.

[258] *See* Loupe, *supra* note 254, at J1.

[259] *See* White, *supra* note 256 at C1; Betsy White, *As the Pupils Reflect, Their Teachers Worry*, ATLANTA J. & CONST., Aug. 18, 1994, at A1.

[260] Diane Loupe, *South Teacher Breaks Silence with Protest*, ATLANTA J. & CONST., Aug. 23, 1994, at J1.

[261] *See supra* note 168 and accompanying text for a discussion that prayer is inherently a religious activity.

[262] *See also supra* note 234.

are in compliance? How would that be done?"[263]

The object of criticism in the editorial is the very point that the *Lemon* Court feared. In order to insure school compliance with the statute, "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected."[264] It does not matter whether teachers actually are praying during the moment of reflection or whether students have been influenced by the religious actions of their teachers, because the potential exists for both of these concerns to materialize. As the *Lemon* Court could not ignore the potential for religious teachers to insert religious doctrine into the teaching of secular courses,[265] the Georgia courts cannot ignore the potential for religious teachers to insert religious indoctrination into the moment of silence by their actions. "Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment."[266] A constant surveillance is necessary. This periodic contact with the teachers and schools would inevitably result in entanglement between church and state.[267]

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[263] Editorial, *Leaders Should Reflect for a Moment*, ATLANTA J. & CONST., Feb. 25, 1994, at A6.

[264] Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

[265] *See id.* at 617.

[266] *Id.* at 619.

[267] An additional argument may be made indicating that government surveillance is necessary in order to ensure that prayers authorized by subsection (c) of the Moment of Quiet Reflection in Schools Act are "nonsectarian and nonproselytizing in nature." *See supra* note 99 and accompanying text for entire text of the statute. This argument, however, is more difficult, because student-initiated school prayer has not been held unconstitutional by the Supreme Court. *Compare* Lee v. Weisman, 505 U.S. 577, 588–89 (1992) ("The question is not the good faith of the school in attempting to make the [graduation] prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all [by the principal selecting a clergyman] when the object is to produce a prayer to be used in a formal religious exercise . . . .") *with* Engel v. Vitale, 370 U.S. 421, 431–33 (1962) (invalidating the New York law authorizing state sponsored Regent's prayer). Moreover, the surveillance of nonsectarian and nonproselytizing prayer at school events, such as graduation or baccalaureate, would not be continuous in the same degree as the daily moment of quiet reflection present in the Georgia statute.

V. CONCLUSION

"[A] government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another."[268]

Moments of quiet reflection in public school classrooms are one last effort by state legislatures to reinstitute religious prayer into the public schools. The United States District Court for the Northern District of Georgia erred in its validation of Georgia's Moment of Quiet Reflection in Schools Act, for the Act fails all three parts of the *Lemon* test. Although this country was founded upon the ethics and mores of the Judeo-Christian religion, the United States was also founded upon, at least in theory, the ideals of equality and tolerance. Too often in our nation's past have we ignored and disregarded the cultures of minorities. By supporting moments of silence in public schools, state legislatures are, in essence, providing state support, assistance, and influence to the majority faith. Only by reasserting the respect that all individuals and religious beliefs deserve can we begin to reassemble the wall Thomas Jefferson and James Madison erected so long ago. Only then can the rights of the minority be upheld.

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[268] Madison, Memorial and Remonstrance, *supra* note 1, ¶ 8.